

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL 76-1450

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

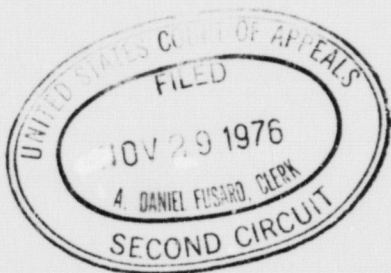
against

MAX JIMENEZ and JAMES H. MALONE,

Appellants

*On Appeal from the United States District Court for the
Eastern District of New York*

Appellants' Brief



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PRELIMINARY STATEMENT

This is an appeal from the Judgment of Conviction entered against each appellant on September 17, 1976 after a jury trial before the Honorable Jack B. Weinstein.

Each appellant was indicted on the last day of the fifth year of the statute of limitations and convicted of violating Title 18 USC Sections 241, 242 and 2, the only two counts submitted to the jury. The convictions are based upon the allegation that between the years 1969 to 1971 the defendants, with another, did conspire to willfully and unlawfully use their authority as Police Officers, to obtain money by theft, extortion and other unlawful means, from others, who were citizens of the U.S., by injuring, oppressing, threatening and intimidating them in the free exercise and enjoyment of a right and privilege secured to them by the Constitution of the U.S., namely, the right not to be deprived of property without due process of law, and did abstract approximately \$4,500. to themselves from others.

Appellant Jimenez was sentenced to the custody of the Attorney General for a period of nine years on count one and one year on count three, to run concurrently.

Appellant Malone was sentenced to the custody of the Attorney General for a period of seven years on count one and one year on count three, to run concurrently.

Both appellants are at liberty pending the outcome of this appeal.

STATEMENT OF FACTS

Maximo H. Jimenez and James H. Malone were charged with having conspired to and having violated the civil rights of citizens of this country during a period from 1969 to 1971.

Each appellant was a member of the Special Investigations Unit of the Police Department of the City of New York during part or all of the aforementioned period. It was charged that each appellant and a deceased officer conspired and actually obtained money by unlawful means by abusing their authority as Police Officers.

A jury trial was conducted before the Honorable Jack B. Weinstein and the government produced both police testimony and civilian witnesses. The indictment had been returned on the last day of the applicable statute of limitations and the appellants' pretrial motions to dismiss were denied.

Following the jury verdict of guilty the appellants were sentenced to nine years and seven years respectively. The Court indicated in each sentence that a prior pattern had been established by the Court and would have to be followed. At one point the Court expressed regret at having to participate in a blackmail scheme to induce cooperation.

STATEMENT OF ISSUES PRESENTED

1. DID THE TRIAL COURT VIOLATE THE CONSTITUTIONAL RIGHTS OF THE APPELLANTS UNDER THE 5TH, 6TH, 8TH AND 14TH AMENDMENTS, WHEN AT SENTENCE THE COURT APPLIED MECHANICAL RULES AND DID NOT INDIVIDUALISE THE SENTENCES TO FIT EACH CRIME AND EACH APPELLANT?
2. DID THE PREINDICTMENT DELAY WARRANT A DISMISSAL OF THE INDICTMENT AND CONSTITUTE A VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION?
3. WAS THE GUILT OF JAMES H. MALONE PROVEN BEYOND A REASONABLE DOUBT?

POINT ONE

THE SENTENCE STANDARDS IMPOSED WERE
VIOLATIVE OF THE CONSTITUTIONAL
RIGHTS OF THE DEFENDANT

On September 17, 1976 Maximino Jimenez and James H. Malone were sentenced to prison terms after having been found guilty by a trial jury. During the sentence procedure Judge Jack B. Weinstein set forth the pattern of sentences which he had established and felt bound to follow. Judge Weinstein in pronouncing sentence stated at pages 21, 22, 23 of the sentence minutes:

"But, the general pattern has been a plea early with cooperation, very light sentence. A plea without cooperation, substantial sentence. A trial without cooperation, a very substantial sentence. A subsequent cooperation, a reduction of sentence. I think that is the general pattern. Your man comes in without any cooperation, tried by jury, found guilty, a very serious aspect, testified and lied. He comes in at the very top."

"...I am not going to ignore the fact that he did not cooperate."

"You still haven't told us what he knows about the situation."

The Court stated clearly that the sentence imposed would be based upon the category into which the convicted defendant placed himself. The Court acted in a mechanical fashion in imposing sentence and did not use its expertise and discretion to individualize the sentence imposed.

The Appellate Review of sentences is limited by the general principals stated in Dorszynski v. United States, 418 U.S. 424,

and restated by this Court in United States v. Seijo, ____ F.2d ____
(2nd Cir. June 24, 1976); United States v. Stein, ____ F.2d ____
(2nd Cir. October 22, 1976); and United States v. Robin, ____ F.2d ____
(2nd Cir. October 15, 1976). Material misinformation relevant
to sentence has been held violative of due process.

A similar exception which permits appellate review of sentence has been found to exist when the Court fails to exercise its discretion and takes a mechanical or automatic approach to sentencing. This Court has expressed its disapproval of such an approach in United States v. Baker, 487 F.2d 360,361 (2nd Cir. 1973) wherein the Court stated:

"We reaffirm our disapproval of statements by a trial judge reflecting a fixed sentencing policy based on the category of crime rather than on the individualized record of the defendant. This applies to statements reflecting a policy of never incarcerating, as well as to a policy of always imprisoning."

Individualization of sentences was long ago promulgated by the United States Supreme Court. In Williams v. People of the State of New York (337 U.S. 241) the Court at page 247 stated:

"The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.

On the contrary, a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders, any could be less severely punished and restored sooner to complete freedom and useful citizenship." (page 249)

(See also Williams v. State of Oklahoma, 358 U.S. 576; United

States v. Cavazos, 530 F.2d 46 [5th Cir. 1976]; United States v. Ingram, 530 F.2d 602, 603 4th Cir. 1976).

In Woosley v. United States, 478 F.2d 139 (8th Cir. 1973) the Court cited Yates v. United States, 356 U.S. 363 as authority for appellate review of sentences as an example of the supervisory power that appellate courts may exercise over the administration of justice in the lower Federal Courts (McNabb v. United States, 318 U.S. 332). In Woosley, the Court analyzed the mechanical approach to sentencing when it stated at page 143:

"The general rule precluding review of a sentence within statutory limits is not dispositive of the problem we confront here. We do not deal here with a sentence imposed in the informed or sound discretion of a trial judge after consideration of all the circumstances surrounding the crime. See Tucker, supra, 404 U.S. at 447, 92 S. Ct. 389; Williams v. Oklahoma, 358 U.S. 576, 585, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959). Instead, we deal with a predetermined sentence resting upon a policy followed by the trial judge in certain selective service cases. A mechanical approach to sentencing plainly conflicts with the sentencing guidelines announced by the Supreme Court in Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1237 (1949), and Williams v. Oklahoma, supra, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516."

The Court in Woosley went on to state at page 144:

"A mechanical approach to sentencing, such as that used here, ignores the Supreme Court's decree that sentences be tailored to fit the offender. We reject the view that in all cases the trial judge's action is immune from review simply because we do not ordinarily review sentences within statutory limits. Although a trial judge possesses wide discretion in sentencing, he is not free to ignore sentencing guidelines established by the Supreme Court."

We agree with the reasoning of the Daniels case and its progeny. The rule against review of sentences is founded primarily upon the premises that a trial judge, who has the best opportunity to observe the defendant and evaluate his character, will exercise discretion in imposing sentence. See Briscoe v. United States, 129 U.S.App. D.C. 146, 391 F.2d 984, 986 (1968). On that assumption we ordinarily defer to the trial court's judgment. However, where as here, the district court has not exercised discretion in imposing sentence, there is no reason for us to defer to the trial court's judgment. In reviewing such a sentence, we would not be usurping the discretion vested in trial judges; rather we would be according the defendant the judicial discretion to which he is entitled."

(See: United States v. McKinney, 466 F.2d 1403 (6th Cir. 1972); United States v. Charles, 460 F.2d 1093 (6th Cir. 1972); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971).

If every citizen is guaranteed due process of law then no one may deprive him of his right to a fair trial. This may not be done indirectly by imposing greater sentences if a defendant goes to trial rather than plead guilty. If punishment is increased because a defendant elects to proceed to trial, which is a fundamental and basic right of every defendant, then there is an atmosphere of coercion acting to diminish a right guaranteed by the Sixth Amendment. In United States v. Wiley, 278 F.2d 500 (7th Cir. 1970) the Court stated at page 504:

"Our part in the administration of Federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful. It is evident that the punishment imposed by the district court on Wiley was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted."

(See, in accord: United States v. Peskin, 527 F.2d 71,87 (7th Cir. 1975); United States v. Derrick, 519 F.2d 1 (6th Cir. 1975).

It is equally improper to assume that because the defendant who testified was convicted, that he lied, and to increase his sentence; therefore Judge Butzner of the Fourth Circuit in United States v. Moore, 484 F.2d at 1288 put the theory succinctly as follows:

"Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence."

In Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) the sentencing Court inflicted additional punishment because the defendant refused to confess guilt at the time of sentence; the defendant was found guilty of bank robbery after having testified that he did not commit the crime. The Court of Appeals vacated the sentence because the lower Court had placed the defendant in the position of confessing to the robbery and therefore having committed perjury (since he had denied participation) in violation of his Fifth Amendment right and repaired it to surrender his post-conviction remedies or face a greater sentence (Poteet v. Fauver, 517 F.2d 393,395 (3rd Cir. 1975). United States v. Wright, 533 F.2d 214, 216 (5th Cir. 1976) follows the reasoning in Thomas.

A similar finding was made in United States v. Rogers, 504 F.2d 1079 (5th Cir. 1974) wherein the Court did not ask for a confession of guilt directly, but requested cooperation in gathering

evidence relative to coconspirators. The Court held this to be violative of the Fifth Amendment. The Court stated at page 1085:

"When it has been made to appear that longer sentences have been imposed by the courts because the defendants refused to confess their guilt and persisted in their claims of innocence we have vacated the sentences. *United States v. Rodriguez*, 5 Cir. 1974, 498 F.2d 302; *Bertrand v. United States*, 5 Cir. 1972, 467 F.2d 901; Cf. *United States v. Moore*, 5 Cir. 1970, 427 F.2d 38, cert. denied, 400 U.S. 965, 91 S. Ct. 357, 27 L.Ed.2d 384; *Thomas*, supra. Until now we have had no occasion to address ourselves to the situation sub judice, where the trial court did not ask Rogers to directly confess his guilt, but rather to "sing" about others involved in the conspiracy. But we view this as a distinction without a difference."

The abuse of discretion in sentencing is most apparent when a defendant is punished because he avails himself of his Sixth Amendment rights. In *United States v. Stockwell*, 472 F.2d 1186 (9th Cir. 1973) the Court stated at 1187:

"Here, however, the defendant contends he was punished with four additional years in prison for taking the court's time with a trial. While we do not believe that the experienced trial judge actually punished the defendant for standing trial, the record leaves un rebutted the inference drawn by the defendant.

If there was such a use of the sentencing power, the constitutional right to trial would be impaired. See *Baker v. United States*, 412 F.2d 1069, 1073 (5th Cir. 1969), cert. denied, 396 U.S. 1018, 90 S.Ct. 533, 24 L.Ed.2d 509 (1970); *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960). The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an

appeal that arises when a defendant appeals, is reconvicted on remand, and receives a greater punishment. See North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969)."

(See: United States v. Ravhoff, 525 F.2d 1170, 1179 (8th Cir. 1975).

The abuse of discretion in sentencing is equally apparent when the Court contradicts the judicially approved policy of individualizing the sentence imposed. The Court must insist that there be a "high order of discretion to fit the sentence to the crime and to the defendant." (Stevens v. Warden, 382 F.2d 429, 433 (4th Cir. 1967); United States v. Hartford, 489 F.2d 652, 655, 656 (5th Cir. 1974)).

United States v. Foss, 501 F.2d 522 (1st Cir. 1974) examines the extent to which "general deterrence" should be considered in fixing sentence. In finding that the validity of the deterrence justification has not been disapproved and that prison sentences have a generally deterrent effect, the Court nonetheless found that other factors must be weighed and considered. Deterrence cannot be the only factor. Judge Weinstein said he did not sentence for purposes of rehabilitation or incapacitation (pg. 17 of minutes September 17, 1976), and not on the basis of the individual (pg. 19) but only for deterrence.

The sentence pattern established by Judge Weinstein reduced the sentencing procedure of the defendants to the mechanical process of finding what category they fit into and imposing sentence accordingly.

Each artificial surata violated due process for a different reason. The Fifth Amendment was violated by coercing cooperation to obtain the reward of a lesser sentence. The Sixth Amendment was violated by coercing a plea of guilty to obtain a lesser sentence. At no time did the Court allow itself to use its expertise, experience and wisdom in determining the sentence to be imposed. At no time did the Court exercise its discretion in sentencing. Individual background or culpability played no role in the sentences imposed. Pursuant to the standards imposed the most culpable, venal and undesirable defendant would be treated most leniently if he immediately cooperated and entered a guilty plea; while the least culpable, venal or undesirable defendant would be treated with the least leniency because he availed himself of his constitutional rights and was found guilty by a jury.

For all of the foregoing reasons the sentence imposed below should be vacated and the case remanded for resentencing.

POINT TWO

PREINDICTMENT DELAY RESULTED IN
DENIAL OF DUE PROCESS AND EQUAL
PROTECTION OF THE LAW

The underlying indictment was not found by a grand jury until the last day of the five year statute of limitations. The government's witnesses however had been known to them and cooperating with various governmental agencies as early as 1972. With the passage of time two principals, one of whom was named as an unindicted coconspirator, died.

The resulting prejudice to the defendants on trial is obvious. Testimony with regard to one or both individuals' participation or knowledge of the alleged criminal acts had to be received unchallenged by the defense since both men were deceased at the time the indictment was found. It follows that since there was no pending indictment neither defendant had a reason to interview either man with a view toward perpetuating testimony.

In addition each defendant was severely prejudiced by the fact that these two additional witnesses were not available for consultation with regard to the events pleaded in the indictment which were five years old. The fact that memories grow dim with the passage of time is one which must be accepted by any defendant. Where however two additional "memory banks" are lost due to prosecutorial inaction the actual prejudice alluded to in United States v. Marion, 404 U.S. 597, becomes apparent. In Marion at page 325-326 it was stated in part that:

"No actual prejudice to the conduct of the defense is alleged or proved, and there was no showing that the

government intentionally delayed to gain some tactical advantage..."

The Court reviewed areas of possible prejudice but found that the delay in formal accusation, and hence the delay in preparation by the defendant, allows the prosecutor, as it did herein, to proceed methodically to build its case.

In Dickey v. Florida, 90 S.Ct. 1564, delay by the government was analyzed in terms of a denial of the right to a speedy trial. The Court criticized unnecessary delay, delay which was the result of neglect, and any delay which was oppressive or purposeful. The question posed by the Court in testing the legitimacy of the delay was whether the delay might reasonably have been avoided. (See Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965). Whether the delay is in the presentation to the grand jury or in effectuating the arrest is again a distinction reflecting no difference. (United States v. Feinberg, 383 F.2d 60,65 (2nd Cir. 1967).

Even where there is a "continuing investigation" or undercover operation the Courts have been critical of the prosecution where the preindictment delay continues and notice to the defendant of any possible charge is continuously delayed. (United States v. Jackson, 504 F.2d 337 (8th Cir. 1974).

By waiting until the last day of the statute of limitations the government effectively foreclosed any meaningful investigation on behalf of the defense and prevented him from obtaining the recollection of persons actually present at the time the crimes are alleged to have taken place. This unwarranted delay should have

resulted in the trial Court granting the application to dismiss,
and it was error for the Court to have denied said application.

POINT THREE

THERE WAS INSUFFICIENT EVIDENCE
TO ESTABLISH GUILT BEYOND A
REASONABLE DOUBT

Due process requires that the government prove each element of the crimes charged beyond a reasonable doubt. The government, therefore, "...has a heavy burden of proof in a criminal case; the defendant has none." (Rodgers v. United States, 402 F.2d 630 (9th Cir. 1968)).

Recently the Supreme Court in Mullaney v. Wilbur, 421 U.S. 684 the Court found a state statute unconstitutional and violative of due process it shifted the burden of proof to the defendant in a murder case. The Court held that the prosecution always has the burden of establishing proof of guilt beyond a reasonable doubt, and that due process requires that the burden never shift to a defendant.

In the case before the Court substantially all of the testimony was brought in against the defendant Jimenez. James H. Malone stands convicted based upon the testimony of the witness Boland. That witness testified that he never spoke to Malone at any time. Boland spoke to Jimenez but never to Malone.

The government established that Malone was part of a team of detectives who brought Boland and another into a stationhouse for questioning. At one point Boland had a conversation with Jimenez about a bribe, a conversation which Jimenez denied as he did the allegation of the payoff. After speaking to Boland, Jimenez spoke to Butera and Malone, and Boland did not hear any part of the

conversation. Thereafter receipts were given to Boland - at trial he said Malone gave him the receipts while at the grand jury he did not remember who gave them to him.

There is no other evidence tending to connect Malone with any crime. The inference to be drawn from the alleged conversation between the detectives is as consistent with guilt as it is with innocence, and should have resulted in a dismissal of the charge or a not guilty verdict.

The standards of proof beyond a reasonable doubt is as old as this country. The basic protection of this theory, and one of the boasts of a free society, is founded in the procedural content of due process. (See: Leland v. Oregon, 343 U.S. 790, 802-803).

This standard of proof was not satisfied by the evidence adduced against James H. Malone.

In the Supreme Court decision in In Re Winship, 397 U.S. 358 the Court in discussing this area stated at pages 363-364:

"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence - that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake

interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

It is therefore respectfully submitted on behalf of James H. Malone that the evidence presented against him at trial did not meet the standard of proof beyond a reasonable doubt and that the conviction should therefore be reversed and the indictment dismissed.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED OR IN THE ALTER-
NATIVE THE MATTER SHOULD BE REMANDED TO THE
DISTRICT COURT FOR RESENTENCE.

Respectfully submitted,

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MICHAEL S. WASHOR
Attorney for Appellant Jimenez

WASHOR

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of Nov. 1976 at No. 225 Cadman Plaza East., Brooklyn, NY

deponent served the within ~~deponent~~ *Brief*
upon U.S. Atty., East. Dist. of N

the Appellee herein, by delivering — true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
29 day of Nov. 1976.

Edward Bailey
Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978